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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re:

Broadband PCS C and F Block
Installment Payment
Restructuring

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WT Docket No. 97-82

REPLY COMMENTS OF ANTIGONE COMMUNICATIONS
LIMITED PARTNERSHIP AND PCS DEVCO, INC.

ANTIGONE COMMUNICATIONS LIMITED
PARTNERSHIP and PCS DEVCO, INC.

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**REPLY COMMENTS OF ANTIGONE COMMUNICATIONS
LIMITED PARTNERSHIP AND PCS DEVCO, INC.**

Antigone Communications Limited Partnership and PCS Devco, Inc. (collectively, "Antigone/Devco"), by their attorneys, hereby submit their Reply Comments to the Comments filed by NextWave Personal Communications, Inc. (collectively with its 100% parent, NextWave Telecom, Inc. "NextWave") and General Wireless, Inc. ("GWI") on June 23, 1997.

In their Comments, NextWave and GWI claim debt restructuring or reduction of the principal amount owed are the only solutions to the grave financial problems those two companies are experiencing. NextWave claims that the high prices paid for C-block licenses were "unanticipated" and that Wall Street has turned a cold shoulder to NextWave. NextWave Comments at p.16. GWI similarly blames its dilemma on the unwillingness of financiers to commit to GWI. GWI Comments at p.3. NextWave and GWI blame everyone but themselves for their current problems; however, that is where the fault lies.

NextWave and GWI now admit what many analysts observed at (and even prior to) the time the C-block auction closed. They paid too much for the licenses they acquired. Now, in an effort to avoid the expected and foreseeable consequences of their own voluntary acts, NextWave and GWI are asking the Commission to

take desperate measures to keep them afloat. The Commission should not buy into the scheme.

GWl claims that the fair market value ("FMV") of its C-block licenses has decreased since the auction. Given this alleged "decline" in the FMV of what it purchased from the government at auction, GWl makes the preposterous suggestion that the FCC reduce the amount of the principal on its notes due to the government to pay for its C-block licenses. Even though GWl bid substantially more than any of the A&B block licenses, it would only like to pay an amount near what the average A&B block license winner paid. Under GWl's proposed "restructuring", GWl would pay less per pop than 25% of the A&B block licensees, and NextWave's winning bid amount of \$4.8 billion would be reduced to \$1.8 billion while GWl's \$1 billion auction bid would be reduced to \$405 million. GWl Comments at pp.10-11, Table II.

There is no rational justification for the relief requested by GWl. The licenses are worth less than what NextWave and GWl bid...a fact that most analysts knew at the time GWl and NextWave were making their bids. There has been no "decline." But even if there had been, the risk of a decline in perceived value is something that Antigone/Devco and all competing bidders had to factor into their business plans and bidding strategies. The risk of decline is on auction bidders, not the government or anyone else.

Any life-saving measures by the Commission now would send the wrong message to future auction participants, entitle past

auction participants in all other auctions to receive the same relief, and preclude the Commission from enforcing any payment rules in future auctions. The question before the Commission is not how to restructure but whether C-block licensees are entitled to such extraordinary relief, and whether affording such relief will cripple the auction process for years to come. NextWave and GWI submitted unfinanced and insincere bids. The only rational solution for the Commission is to require interest payments now, take back the licenses of those who do not pay, and reauction those licenses as it promised to those that dropped out the first time.

I. The Bidding of GWI and NextWave Was Insincere; Their Intent during the Auction Was to Horde Spectrum and Hope for a Post-Auction Financing or Regulatory Miracle.

NextWave and GWI both claim that unforeseeable circumstances beyond their control entitle them to extraordinary relief in the form of restructuring the debt they incurred in acquiring their C-block licenses. This is a far cry from what NextWave said when it won the licenses at auction in May 1996. The president of NextWave, Mr. Alan Salmasi admitted at that time that:

[E]xperts [have] questioned the viability of the price per POP we paid for the C-block licenses, ...¹

Mr. Salmasi went on to identify "factors" which NextWave claimed would prove that conventional wisdom (*i.e.*, that NextWave overpaid) to be wrong:

¹ "NextWave Acquires PCS Licenses" Press Release May 2, 1996.

(1) the combination of better demographics for the C-block BTA licenses acquired by NextWave as compared to the A&B-block MTA licenses; (2) the favorable government payment terms; (3) our lower cost of equipment; (4) our unique wholesaler's strategy; and (5) our technical development activities and network buildout plans.

Id. NextWave knew it was paying a premium for the spectrum and made a conscious decision to do so based on the benefits it anticipated. GWI followed along, paying a price per POP more than three times the average price per POP paid by A&B block licensees.²

In April 1996, at the same time NextWave and GWI were sending C-block bids into orbit, others were openly skeptical about their chances for success. For example, the April 1996 edition of "tele.com" Magazine pointed out that the New York City MTA PCS license covering 26 million people sold for \$442 million, while bidding for the basic trading area license for New York City (the C-block) covering only 18 million people had reached \$858 million.³ Further, the article reported that:

New wireless subscribers tend to use their phones far less than longtime customers, who tend to be business people. U.S. cellular users' average monthly bills, currently about \$52 per month, are falling at about 8 percent per year.

Industry analyst Barry Goodstadt, the director of wireless consulting at A.T. Kearney said:

² See GWI Comments at pp.9,11.

³ "Wireless Bidding Wars: Big Money, Big Problems" tele.com, April 1996.

Auctions just generate irrational behavior. People think "This is my last chance to get into U.S. cellular," but there's no economic justification for most of these bids.

Id. Tom Elliott, managing partner of Arthur Andersen's Communications Industry Practice predicted:

With the kind of upfront investments that are being made, we may see bankruptcies. We may see mergers of companies that are struggling. We will see some shakeout. We are seeing the lemming effect -- and the lemmings are now going over the cliff.

Id. No matter what gobblygook NextWave and GWI now spout about a supposed "meltdown" of financial markets, Wall Street was publicly calling them "lemmings...now going over the cliff" before the C-block auction was even over.

In rationalizing NextWave's bidding, Salmasi also said:

We adhered to our original bidding plan and strategy, which was validated as the auction progressed. This bidding plan, which was developed before the start of the auction and was approved by our investors, takes advantage of one of the most sophisticated wireless business software models developed to date. This tool enabled us to use a complex mix of factors as inputs to the model, which created our bid ceiling sensitivity analysis for each market, assuming different rates of return on the overall investment made in order to provide C-block based PCS services at various prices per POPs. We, along with all of our investors, fully anticipated paying the prices we paid, and believe we received excellent value for the spectrum we purchased."⁴

NextWave claims that it had a business plan and financing in place (though no evidence of sufficient committed financing has ever been provided) and was aware of how much it was paying for its C-block licenses (and that the price per POP was

⁴ Id., (emphasis added).

substantially more than the price per POP paid for the A&B-block licenses covering the same metropolitan areas).

Now, NextWave has decided it cannot carry out its plan. There are only two possible explanations (a) NextWave's "sophisticated wireless business software models" were dreadfully wrong, leaving NextWave with a shortfall in its budget so severe that it cannot continue or (b) NextWave never had funding sufficient to carry out its business plan and intended to horde spectrum, then hold the Commission hostage if it was unable to raise financing sufficient to cover its bids.

GWI's situation is very similar. At the time it made its bids, it represented to the Commission that it would be able to fully finance its purchases and the buildout of its proposed PCS system. Now, just one year after the auction, and at the very beginning of its start-up phase, it is asking the Commission to discount by approximately 40% the amount it owes to the FCC for its licenses. GWI, like NextWave, is either the victim of poor advance planning or no advance planning.

Whatever the reason, the critical issue is whether it is the government's responsibility to rescue a bidder that has paid too much? The answer is, the government has no obligation to bail NextWave or GWI out of their self-induced financial woes. Neither NextWave nor GWI claim that the Commission misrepresented the value or quality of the assets being sold, and neither has offered any evidence of a case in the annals of U.S. Government auction history where a bidder that simply paid too much is

allowed to have its debt "restructured" or principal amount due drastically reduced to cure the bidders own recklessness, and there are no legitimate public policy considerations which support such special treatment of the C-block auction's least sincere bidders. Only the private interests of NextWave and GWI would be advanced if such relief were offered to them.

The Commission's rules were clear to all bidders before the auction commenced. The risk of overbidding was acknowledged by all who participated, and those whose business plans did not support the per POP prices bid by NextWave and GWI did not match their bids for fear of the consequences. Nobody pointed a gun at the head of NextWave or GWI officials to force them to send C-block bids into the stratosphere. It would be grossly unjust to reward NextWave and GWI for their foolishness and recklessness, while punishing those participants that obeyed the rules and developed more sensible business models, by denying them a chance to compete in a reauction with sincere, qualified bidders.

II. The Complaints of NextWave and GWI about the State of the Domestic Capital Market Are Unfounded and Irrelevant.

The most significant change in the landscape which NextWave and GWI cite for their current financial woes (and in turn for their entitlement to special relief) is their supposed cold shoulder from investors. NextWave and GWI attribute that cold shoulder to an alleged overall grim outlook Wall Street has taken on the wireless industry. NextWave Comments pp.12-13. NextWave retained the services BT Wolfensohn to prepare a supporting

exhibit to demonstrate why restructuring for NextWave is necessary and a good idea. But NextWave fails to note that the majority of IPOs issued since March 1997 have been successful, and many wireless telecommunications companies have seen their stock prices rise substantially since April. (NextWave also fails to mention that BT Holdings (which apparently is related to BT Wolfensohn) had invested at least \$1 million cash in NextWave, so its statement is biased and entitled to no weight.)

NextWave mentions that the high yield debt offering of Chase Telecommunications, L.P. was postponed in June. NextWave Comments at p.13. But in the meantime, InterCel, Inc. (now trading as Powertel, Inc.) successfully completed a sale of \$300 million of Senior Notes, and 100,000 shares of preferred stock to raise an additional \$50 million in cash. Reuters Newswire, June 5, 1997. Qwest Communications Corp., another telecommunications firm that intends to become a "carrier's carrier," completed a successful IPO at the end of June. It issued 13.5 million shares, priced at \$22 and at the end of the first day of trading on the stock, the price had risen 27% to \$28 per share. Dow Jones Newswire, June 14, 1997. That stock closed yesterday at \$27.25 per share. In fact, of 66 IPOs made between June 3, 1997 and July 3, 1997, 63 either met or exceeded the offer price at the end of the first day of trading.⁵ And of the 58 IPOs made between April 1, 1997 and May 30, 1997, 52 met or exceeded the

⁵ See Hoover's, Inc. Online "IPO Central."

offer price at the close of the first day of trading.⁶

As for individual wireless telecommunications issues, there has been a substantial rebound in those stock prices since April 1997. For example, shares of Omnipoint traded below seven dollars during the middle of April, but closed at \$15.75 per share on July 7, 1997. Shares of Aerial Communications traded below four dollars during the week ending April 11, 1997, but have rebounded nicely, with the stock closing at 8 7/16 on July 7, 1997. Powertel, Inc. traded at a low of \$9.50 per share in April, and closed yesterday at \$13.75. Whatever "weakness" there was in the market for wireless telecommunications issues seems to have abated...for everyone but NextWave and GWI. So the question becomes, what is wrong with these two companies? The answer is simple -- they paid too much at auction, and no one in the investment community thinks their business plans can support the heavy debt they voluntarily imposed on themselves by bidding too much for their C-block licenses.

III. Principal Reduction or Debt Restructuring, as NextWave and GWI Suggest, Requires a Reauction or Lottery.

Adoption of any of the proposed debt reduction or restructuring suggestions offered by NextWave or GWI would require the Commission to conduct a reauction or lottery. The availability of relief sought (i.e., reduction of principal and/or extension of time in which notes to the government must be paid and changes in the terms of the notes) would have altered

⁶ Id.

the bidding strategies of every other qualified bidder in the C-block auction. For example, Antigone/Devco would have had a different bidding strategy if they knew they would only have to pay 40% of the amount that they bid or had a more extended time in which to pay down the government's notes than set forth in the rules.

Whether or not the changes proposed by NextWave and GWI can be seen as "logical outgrowths" of the proposed (and adopted) rules is not material; it is the retroactive application of these new rules to NextWave and GWI that is prohibited under the principals of procedural due process. Either the Commission must reauction the licenses or else the Commission should establish the new ground rules (*i.e.*, prices, interest rate and payment timing) and lottery these licenses from among the original C-block applicant pool, so that everyone (not just NextWave and GWI) gets the chance to receive this windfall from the government.

IV. Allowing NextWave to Restructure Will Destroy the Credibility of the FCC's Auction Process.

The Commission, in a lengthy and public proceeding, adopted rules and regulations that all C-block bidders agreed to when they tendered their applications to bid. NextWave and GWI now seek relief from many of the rules the Commission adopted (and which NextWave did not oppose at the time of adoption), and with which all other bidders were required to comply. GWI seeks relief from its reckless bids in the form of a post-auction

reduction of its winning bid amounts. When the Commission cuts through the hyperbole, NextWave and GWI are (and have been since at least April, 1996) "lemmings...now going over a cliff" and have shown no special circumstances other than that they owe more money than, say the IVDS defaulters. If C-block licensees who made patently speculative bids are afforded the relief requested despite the total absence of special circumstances, then under Melody Music⁷ and its progeny, every other auction winner, past, present or future, will be entitled to the same or similar relief no matter what FCC rules provide.⁸

This is not the message the Commission should send. It is difficult to admit that expected funds will not be collected, and that a reauction may engender only sincere (and therefore lower) bids. But where, as here, the alternative (i.e., payment relief to rescue insincere bidders from their own voluntary acts) would render this Commission a laughingstock, the Commission must preserve its integrity.

CONCLUSION

NextWave and GWI are not entitled to either a reduction in the principal amount owed to the government for its licenses or a debt restructuring. It is especially outrageous for the Commission to even consider a reduction in principal. The bids

⁷ Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

⁸ Thus, for example, those C-block licensees that made their March 21, 1997 payments are now demanding (and could be entitled to) a refund from the U.S. Treasury. See, e.g., Dow Jones Newswire, June 26, 1997 re DiGiPH PCS, Inc.

were made freely by the two companies. If the bids were based on unrealistic business models, it is not the job of the Commission to assist them, because there were at the time of the auction (and remain today) bidders ready to make bids pursuant to better business plans. Also, the floodgate effect would be tremendous. No licensee will want to pay the full amount it bid in any prior auction, and no past or future bidders will expect to pay the amount they bid.

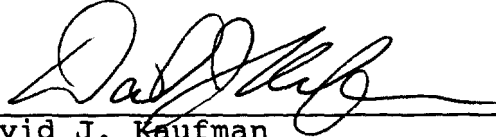
There is no legal precedent for such action. In fact, any post-auction adjustment of the terms under which the auction was conducted (i.e., an agreement to let a winning bidder pay only 40% or 50% of its winning bid) would violate the due process rights of each unsuccessful bidder.

Finally, the factual basis for the relief requested is flawed. Financiers appear ready and willing to pledge money to business plans they believe will be successful, and investors are supporting wireless telecommunications ventures that they believe will succeed. The problem with NextWave and GWI is they simply overbid, and the solution is for the Commission to foreclose and

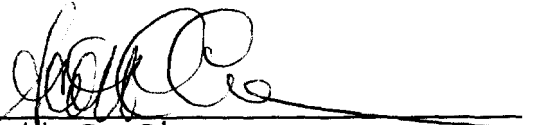
reauction or lottery the licenses so that the public may have the benefits of competition from better prepared licensees.

Respectfully submitted,

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July 8, 1997
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CERTIFICATE OF SERVICE

I, Monette E. Hemans, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "**Reply Comments**" to be sent via hand delivery, or first class U.S. mail this 8th day of July, 1997 to each of the following:

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